

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON)
v.)
Respondent,)
) No. 50497-9-II BY Chd
Richard J. Hardy) DEPUTY
(your name))
Appellant.)

I, Richard Hardy, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See attached (1-8)

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

Date: 1-3-2018

Signature: 

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for Additional Grounds

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Additional Ground #1

Violation of due process guaranteed by the
6th Amendment of the Constitution of the
United States.

The Sixth amendment of the Constitution of the United States of America clearly states a defendant in all criminal prosecution be tried by an impartial jury. In this case, procedure to guarantee an impartial jury was not conducted. In structural errors of this type, prejudice is presumed, and the case is reversed and remanded for a new trial.

The trial court in this case never asked the jury pool if they knew any of the parties involved, they were only introduced (RP54 to RP58). Those who know the prosecutor, defendant, witness, defense attorney, or others involved, could clearly have preconceived ideas. This is why the procedure is in place. Because this procedure was not followed, the public has no knowledge whether the jury was impartial, and thus the trial fair. This is in essence why in structural errors the prejudice is presumed.

In addition to not checking the jury pool for familiarity of the persons involved, the court also delayed instructions to the jury and provided no curative instruction or validation no harm was already done. The jury was not instructed to not look-up the case until days after (Feb 21st til Feb 23rd),

they were not asked if they had already done so (RP431). They were not asked to ignore information outside the courtroom they heard already.

Because the trial court failed to follow proper procedure in selecting an impartial jury, we assume they were not impartial. No trial is fair without an impartial jury. The defendant was denied due process. Because the defendant was denied due process, his conviction needs to be reversed and remanded in the interests of justice and the law.

Additional Ground #2

Appeal to Passions and Prejudice of the Jury and Ineffective Assistance of Counsel

A prosecutor may not argue in a way that appeals to the jury's passion and prejudice and invites them to decide the case on a basis other than the evidence. It is, however, within the range of legitimate argument for the prosecuting attorney to characterize the conduct of the accused in language which, although it consists of invective or opprobrious terms, accords with evidence in the case. In the case before you, the prosecution appealed to the passion and prejudice of the jury with the idea of future conduct, conduct that has not occurred. Conduct that has not occurred cannot be admitted to characterize the conduct of the accused. By the trial Court's own admission, it was prejudicial (RP 646), however the trial court erred by allowing it.

The prosecution engaged in misconduct by appealing to the passion and prejudice of the jury with repeated statements suggesting the appellant need to be convicted to prevent his daughter from becoming a future victim. (RP 528; RP 647; RP 644; RP 885)

The issue here is almost identical to the issue found in State v. Thierry, Jr. 190 Wn. App 680; 360 P.3d 940; 2015 Wash. App 2521. In State v. Thierry Jr., there was no mention of a particular future victim needing protection by conviction; in the case before you, the conduct

Was more egregious by putting a name, a specific person close to the appellant, an identity of a future victim.

(RP 647) This was made worse by repetition, not to much unlike State v. Reed 102 Wn.2d 140, 147, 684 P.2d 699 (1984) and violated Wash Code of Prof'l Responsibility DR 7-106 (c)(4).

Also similar and applicable, would be State v. Powell, 62 Wn.App 914, 914, 816 P.2d 860, where Powell successfully argued the prosecution claimed the jury would be "declaring open season on children" if he was found not guilty. Here the appellant argues the prosecution claimed the jury would be declaring open season on his daughter if he was found not guilty; Far more direct, Far more prejudicial.

The prosecution engaged in this misconduct under the guise of accounting for an explanation of the victim's delayed reporting; This was a ruse. This was an error because defense counsel did not make an issue of the Victim's delayed reporting. This evidence is not admissible.

In a similar case, State v. Fisher, the defendant was charged with molesting his stepdaughter 165 Wn.2d 727, 733, 202 P.3d 937 (2009). The trial court in State v. Fisher, to which the Supreme Court agreed, made admissibility of prior misconduct inadmissible unless defense first raised an issue of the accuser's delayed reporting. Here, the statements were made in opening arguments by the

prosecution. (RP 528) Furthermore, the act here is of greater misconduct by the prosecution because the defendant was effectively being accused of future misconduct, misconduct that has not occurred.

Defense counsel was ineffective for only objecting to the prosecution's repeated misconduct once (RP 644) and not during opening statements (RP 528), during trial, and closing arguments. Defense counsel should have requested a running objection. However, since this was objected to, and the trial court overruled, the issue was preserved and the trial court erred by allowing prejudicial statements, and testimony that wasn't material to the case. The trial court admits this was clearly prejudicial, yet ruled the probative value outweighs the prejudicial effect. (RP 647) There was no probative value since the defendant's daughter was not involved in any way: There was no allegation involving the defendant's daughter. The defendant's daughter was not a witness. There was nothing tying the defendant's daughter to this case, other than the accuser's claims of fear future events. Appealing to fear is an appeal to passion and prejudice. There was no probative value.

The remedy for this has been well established and clear. The conviction must be reversed and remanded.

Additional Ground #3 Cummulative Effect

In the Appellate brief written by appeals attorney Stephanie C. Cunningham, it is argued how certain prejudicial evidence should not have been allowed. In the first additional ground of the S.A.G., it was shown the jury was not impartial. In the second additional ground of the S.A.G. it was shown how an appeal to the passion and prejudice was made by the prosecution. The effect of prejudicial evidence, and an appeal to the passion and prejudice of a non-impartial jury is greater than its individual parts. Inadmissible prejudicial evidence, an appeal to passion and prejudice of a jury are the perfect storm for an unfair trial. Justice would best be served by reversal of the conviction and remanding to the lower court for a new trial.

Additional Ground #4

Same Criminal Conduct in Offender Scoring at Sentencing.

As argued by appeals attorney Stephanie C. Cunningham in this appeal, there was not evidence of separate and distinct acts. If this court refuses to grant relief under this argument, by reversing the conviction with prejudice, the appellant would like to argue relief based upon this argument for the purposes of sentencing. The offender score should be 0. The court must vacate the sentence and remand for resentencing.

Defense counsel was ineffective for not making the same criminal conduct argument at sentencing.

For the purposes of sentencing, the case before you is identical to State v. Dolen 83 Wn. App 361, 364, 921 P.2d 590 (1996). In State v. Dolen, the defendant was charged with one count of second degree child rape and one count of second degree child molestation. The state alleged the incidents occurred over a one-year period while the child was 12 and 13 years old. The child testified to six different incidents. Dolen was convicted and appealed. The court ruled the state failed to prove the crimes were committed in separate incidents and should not have been counted as two separate crimes; the court vacated the sentence and remanded for resentencing.

In the case before you, the defendant was charged with four counts of first degree rape of a child. Just as in State v. Dolen: charges over the same time range, testimony to different incidents, and not enough evidence to separate and distinct acts.

Under State v. Edwards, 171 Wn. App 379, 386, 400, 294 P.3d 708 (2012) one of two charges were dismissed, based on this same argument. Since State v. Edwards was decided in 2012 and State v. Dolen in 2006, there seems to be a change in the law. For the purposes of sentencing, dropping counts would have nearly same effect as resentencing with an offender score zero. However, the two results are different. It is also argued here that counts II, III and IV be dismissed on these grounds.

Because there was not sufficient evidence to prove separate and distinct acts, counts II, III, and IV must be dismissed, and the case remanded for resentencing. Because this case mirrors State v. Dolen, it is considered same criminal conduct and the sentence vacated and remanded for resentencing with an offender score of zero.